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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
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9 MICHELE A. BUCKHANAN, )  
10 Plaintiff, ) No. CV-07-385-CI  
11 v. ) ORDER GRANTING PLAINTIFF'S  
12 MICHAEL J. ASTRUE, ) MOTION FOR SUMMARY JUDGMENT  
Commissioner of Social ) AND REMANDING FOR ADDITIONAL  
Security, ) PROCEEDINGS PURSUANT TO  
13 Defendant. ) SENTENCE FOUR 42 U.S.C. §  
14 ) 405(g)  
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16 BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct.  
17 Rec. 17, 24.) Attorney Maureen J. Rosette represents Plaintiff;  
18 Special Assistant United States Attorney Thomas M. Elsberry represents  
19 Defendant. The parties have consented to proceed before a magistrate  
20 judge. (Ct. Rec. 7.) After reviewing the administrative record and  
21 briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for  
22 Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and  
23 remands the matter to the Commissioner for additional proceedings.

24 **JURISDICTION**

25 Plaintiff Michele A. Buckhanan (Plaintiff) protectively filed for  
26 Supplemental Security Income on September 20, 2004. (Tr. 87.)  
27 Plaintiff alleged an onset date of January 1, 2002. (Tr. 87.)  
28 Benefits were denied initially and on reconsideration. (Tr. 39, 35.)

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1 Plaintiff requested a hearing before an administrative law judge  
2 (ALJ), which was held before ALJ Paul Gaughen on March 22, 2007. (Tr.  
3 321-57.) Plaintiff was represented by counsel and testified at the  
4 hearing. (Tr. 334-345.) Medical expert Ronald Klein, Ph.D., and  
5 vocational expert Tom Moreland testified. (Tr. 324-34, 346-52.)  
6 Plaintiff's roommate, Jeffrey P. Townsend, also testified. (Tr. 353-  
7 56.) The ALJ denied benefits (Tr. 18-29) and the Appeals Council  
8 denied review. (Tr. 5.) The instant matter is before this court  
9 pursuant to 42 U.S.C. § 405(g).

10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing  
12 transcripts, the ALJ's decision, and the briefs of Plaintiff and the  
13 Commissioner, and will therefore only be summarized here.

14 At the time of the hearing, Plaintiff was 37 years old. (Tr.  
15 34.) Plaintiff completed the eighth grade and does not have a GED.  
16 (Tr. 335.) Plaintiff's past work experience includes work as a food  
17 server, food preparer, janitor and maid. (Tr. 337.) Plaintiff  
18 testified she suffers from shoulder pain from an old injury, back  
19 pain, pain in her right leg from an old injury, and knee pain. (Tr.  
20 339.) Plaintiff testified that she is sad, depressed and has suicidal  
21 thoughts. (Tr. 343.) Plaintiff also stated that she suffers from  
22 severe migraines requiring her lay down until they pass. (Tr. 344-  
23 45.)

24 **STANDARD OF REVIEW**

25 Congress has provided a limited scope of judicial review of a  
26 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the  
27 Commissioner's decision, made through an ALJ, when the determination  
28

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1 is not based on legal error and is supported by substantial evidence.  
 2 See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v.*  
 3 *Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's]  
 4 determination that a plaintiff is not disabled will be upheld if the  
 5 findings of fact are supported by substantial evidence." *Delgado v.*  
 6 *Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)).  
 7 Substantial evidence is more than a mere scintilla, *Sorenson v.*  
 8 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9<sup>th</sup> Cir. 1975), but less than a  
 9 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir.  
 10 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
 11 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such evidence  
 12 as a reasonable mind might accept as adequate to support a  
 13 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
 14 (citations omitted). "[S]uch inferences and conclusions as the  
 15 [Commissioner] may reasonably draw from the evidence" will also be  
 16 upheld. *Mark v. Celebrenze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
 17 review, the court considers the record as a whole, not just the  
 18 evidence supporting the decision of the Commissioner. *Weetman v.*  
 19 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*,  
 20 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

21 It is the role of the trier of fact, not this court, to resolve  
 22 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
 23 supports more than one rational interpretation, the court may not  
 24 substitute its judgment for that of the Commissioner. *Tackett*, 180  
 25 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
 26 Nevertheless, a decision supported by substantial evidence will still  
 27 be set aside if the proper legal standards were not applied in  
 28

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1 weighing the evidence and making the decision. *Brawner v. Sec'y of*  
 2 *Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). Thus,  
 3 if there is substantial evidence to support the administrative  
 4 findings, or if there is conflicting evidence that will support a  
 5 finding of either disability or nondisability, the finding of the  
 6 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
 7 1230 (9<sup>th</sup> Cir. 1987).

8 **SEQUENTIAL PROCESS**

9 The Social Security Act (the "Act") defines "disability" as the  
 10 "inability to engage in any substantial gainful activity by reason of  
 11 any medically determinable physical or mental impairment which can be  
 12 expected to result in death or which has lasted or can be expected to  
 13 last for a continuous period of not less than twelve months." 42  
 14 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that  
 15 a Plaintiff shall be determined to be under a disability only if his  
 16 impairments are of such severity that Plaintiff is not only unable to  
 17 do his previous work but cannot, considering Plaintiff's age,  
 18 education and work experiences, engage in any other substantial  
 19 gainful work which exists in the national economy. 42 U.S.C. §§  
 20 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability  
 21 consists of both medical and vocational components. *Edlund v.*  
 22 *Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

23 The Commissioner has established a five-step sequential  
 24 evaluation process for determining whether a claimant is disabled. 20  
 25 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is  
 26 engaged in substantial gainful activities. If the claimant is engaged  
 27 in substantial gainful activities, benefits are denied. 20 C.F.R. §§

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1 404.1520(a)(4)(I), 416.920(a)(4)(I).

2       If the claimant is not engaged in substantial gainful activities,  
3 the decision maker proceeds to step two, which determines whether the  
4 claimant has a medically severe impairment or combination of  
5 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If  
6 the claimant does not have a severe impairment or combination of  
7 impairments, the disability claim is denied.

8       If the impairment is severe, the evaluation proceeds to the third  
9 step, which compares the claimant's impairment with a number of listed  
10 impairments acknowledged by the Commissioner to be so severe as to  
11 preclude substantial gainful activity. 20 C.F.R. §§  
12 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App.  
13 1. If the impairment meets or equals one of the listed impairments,  
14 the claimant is conclusively presumed to be disabled.

15       If the impairment is not one conclusively presumed to be  
16 disabling, the evaluation proceeds to the fourth step, which  
17 determines whether the impairment prevents the claimant from  
18 performing work he or she has performed in the past. If plaintiff is  
19 able to perform his or her previous work, the claimant is not  
20 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
21 this step, the claimant's residual functional capacity ("RFC")  
22 assessment is considered.

23       If the claimant cannot perform this work, the fifth and final  
24 step in the process determines whether the claimant is able to perform  
25 other work in the national economy in view of his or her residual  
26 functional capacity and age, education and past work experience. 20  
27 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482

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1 U.S. 137 (1987).

2 The initial burden of proof rests upon the claimant to establish  
 3 a *prima facie* case of entitlement to disability benefits. *Rhinehart*  
 4 *v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172 F.3d  
 5 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once the  
 6 claimant establishes that a physical or mental impairment prevents him  
 7 from engaging in his or her previous occupation. The burden then  
 8 shifts, at step five, to the Commissioner to show that (1) the  
 9 claimant can perform other substantial gainful activity, and (2) a  
 10 "significant number of jobs exist in the national economy" which the  
 11 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir.  
 12 1984).

13 **ALJ'S FINDINGS**

14 At step one of the sequential evaluation process, the ALJ found  
 15 Plaintiff has not engaged in substantial gainful activity since  
 16 January 1, 2002, the alleged onset date. (Tr. 20.) At steps two and  
 17 three, he found Plaintiff has the severe impairments of major  
 18 depressive disorder, borderline personality disorder, obesity and  
 19 chronic hypothyroidism, but the impairments do not meet or medically  
 20 equal one of the listed impairments in 20 C.F.R., Appendix 1, Subpart  
 21 P, Regulations No. 4 (Listings). (Tr. 20, 23.)<sup>1</sup> The ALJ then  
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23  
 24 <sup>1</sup>Plaintiff also alleged physical limitations due to pain in her  
 25 neck, back, shoulder, right leg and knees, as well as severe  
 26 headaches. (Tr. 339, 344-45.) The ALJ found no objective medical  
 27 evidence supporting Plaintiff's allegations of physical limitations  
 28 other than those which would be indicated by her obesity. (Tr. 22.)

1 determined:

2 [C]laimant has the residual functional capacity to perform  
 3 work at the light to medium exertional level, relative to  
 4 her obesity, consisting of the ability to: lift and/or carry  
 5 and push and/or pull up to 15 to 20 pounds frequently and 30  
 6 to 40 pounds occasionally; sit up to 6 hours in an 8 hour  
 7 work day with normal breaks; stand and/or walk at least 6  
 8 hours in an 8 hour day with normal breaks; and, occasionally  
 9 stoop, bend and other postural adjustments. The claimant  
 10 would have no manipulative limitations with her hands. The  
 11 claimant would be required to wear corrective lenses. In  
 addition, the claimant could attend to her personal care, is  
 oriented in all spheres and can perform household chores  
 although she should not work where children are left alone.  
 The claimant would also have a moderate limitation in her  
 ability to interact appropriately with the general public  
 and making goals independently of others. All other effects  
 on the claimant's mental functioning in a work setting would  
 be slight to none and would have no affect on the claimant's  
 ability to function well.

12 (Tr. 23.) At step four, the ALJ found Plaintiff is unable to perform  
 13 any past relevant work. (Tr. 28.) Based on vocational expert  
 14 testimony and the Plaintiff's age, education, work experience and  
 15 residual functional capacity, the ALJ concluded there are jobs that  
 16 exist in significant numbers in the national economy that the claimant  
 17 can perform. (Tr. 28.) As such, the ALJ found Plaintiff was not  
 18 under a disability as defined in the Social Security Act at any time  
 19 through the date of the decision. (Tr. 29.)

20 **ISSUES**

21 The question is whether the ALJ's decision is supported by  
 22 substantial evidence and free of legal error. Specifically, Plaintiff  
 23 argues the ALJ erroneously relied on the opinion of the medical expert  
 24 and failed to properly reject the opinions of examining psychologists.

25 (Ct. Rec. 18 at 12.) Defendant argues the ALJ properly considered

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26 Plaintiff does not challenge this finding and the court concludes it  
 27 is supportive by substantial evidence.

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1 the medical opinions. (Ct. Rec. 25 at 6.)

2 **DISCUSSION**

3 Plaintiff argues the ALJ inappropriately adopted the testimony of  
 4 the consulting medical expert, Dr. Klein, and improperly used his  
 5 testimony as the basis to reject the opinions of Dr. Wert and Dr.  
 6 Rosekrans, examining psychologists. (Ct. Rec. 18 at 15.) Defendant  
 7 argues the ALJ did not reject the opinions of Dr. Rosekrans or Dr.  
 8 Wert, but did not give them controlling weight. (Ct. Rec. 25 at 6.)  
 9 Defendant further argues the ALJ provided valid reasons for the weight  
 10 given to the opinions of the examining psychologists. (Ct. Rec. 25 at  
 11 6.)

12 Dr. Rosekrans examined Plaintiff on October 21, 2004, and  
 13 prepared a psychological assessment. (Tr. 155-62.) He diagnosed  
 14 adjustment disorder with mixed anxiety and depressed mood and sexual  
 15 disorder not otherwise specified (NOS) and assessed a GAF score of 50.<sup>2</sup>  
 16 (Tr. 159.) He noted that Plaintiff reported dyslexia, but tests  
 17 reflected she is in the low normal range of intelligence and had  
 18 worked successfully in the past. (Tr. 159.) Dr. Rosekrans noted  
 19 Plaintiff's alleged dyslexia "would be of concern in certain  
 20 occupations or school situations and should be investigated if she has  
 21 vocational training." (Tr. 159.)

22 Dr. Wert conducted a psychological/psychosexual assessment on  
 23 March 2, 2005. (Tr. 181-92.) Plaintiff was referred to Dr. Wert by

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25 <sup>2</sup>A GAF score of 41-50 indicates serious symptoms or any serious  
 26 impairment in social, occupation, or school functioning. DIAGNOSTIC AND  
 27 STATISTICAL MANUAL OF MENTAL DISORDERS, 4<sup>TH</sup> Ed. at 32.

1 the Division of Children and Family Services. (Tr. 181.) He  
2 diagnosed major depression, recurrent, severe, without psychotic  
3 features; generalized anxiety disorder; posttraumatic stress disorder;  
4 somatization disorder; personality disorder NOS, severe, with  
5 schizoid, avoidant, depressive, dependent, antisocial and self-  
6 defeating traits. (Tr. 191-92.) Dr. Wert assessed a GAF score of 40-  
7 50.

8 On a DSHS psychological/psychiatric evaluation form dated March  
9 7, 2005, Dr. Wert assessed marked functional mental disorders of  
10 depressed mood, social withdrawal, paranoid behavior, physical  
11 complaints and global illness, as well as a moderate functional mental  
12 disorder in verbal expression of anxiety or fear. (Tr. 198.) He  
13 assessed marked limitations in three areas: the ability to exercise  
14 judgment and make decisions; the ability to interact appropriately in  
15 public contacts; and the ability to respond appropriately to and  
16 tolerate the pressure and expectations of a normal work setting. (Tr.  
17 199.) Dr. Wert also assessed moderate limitations in four areas: the  
18 ability to understand, remember and follow complex instructions; the  
19 ability to learn new tasks; the ability to relate appropriately to co-  
20 workers and supervisors; and in the ability to care for self,  
21 including personal hygiene and appearance. (Tr. 199.)

22 Dr. Rosekrans assessed Plaintiff a second time on February 6,  
23 2006, and completed a DSHS psychological/psychiatric evaluation form.  
24 (Tr. 244-51.) Dr. Rosekrans diagnosed major depressive disorder,  
25 recurrent, moderate; posttraumatic stress disorder; personality  
26 disorder NOS, dependent, avoidant, antisocial features; and assessed  
27 a GAF score of 50. (Tr. 246.) Dr. Rosekrans noted Plaintiff is quite  
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1 dependent and needs counseling. (Tr. 247.) He stated Plaintiff  
2 "[m]ay be using her physical problems as a way to avoid becoming more  
3 independent and looking for a job," and opined she "will eventually be  
4 able to hold a job, but should first be in counseling, and may also  
5 need some training in a job she can physically handle." (Tr. 247.)

6 Dr. Rosekrans assessed moderate functional mental disorders in  
7 depressed mood, social withdrawal, physical complaints and global  
8 illness. Moderate functional limitations were assessed in the ability  
9 to understand, remember and follow complex instructions, the ability  
10 to learn new skills, and the ability to exercise judgment and make  
11 decisions. (Tr. 250.) Dr. Rosekrans assessed marked functional  
12 limitations in the ability to relate appropriately to co-workers and  
13 supervisors and in the ability to respond appropriately to and  
14 tolerate the pressures and expectations of a normal work setting. (Tr.  
15 250.)

16 Dr. Klein testified as the non-examining medical expert at the  
17 hearing on March 22, 2007. (Tr. 324-34.) Dr. Klein diagnosed major  
18 depressive disorder, posttraumatic stress disorder, and borderline  
19 personality disorder. (Tr. 325.) He opined that Plaintiff has  
20 moderate limitations in only two areas: interacting appropriately with  
21 the public and setting realistic goals or making plans independently  
22 of others. (Tr. 325.) In all other areas, Dr. Klein assessed slight  
23 to no impairment. (Tr. 325.) He explained Plaintiff's emotional  
24 problems were in place when she worked in the past and were not the  
25 reasons for discontinuing work. (Tr. 325.) He noted that while her  
26 eighth grade education is problematic, her IQ indicates the ability to  
27 learn is intact. (Tr. 325-36.) He opined that Plaintiff can perform  
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1 simple unskilled labor. (Tr. 326.)

2 Other treatment records include notes from the Community Health  
 3 Association of Spokane (CHAS) dated February 2003 to October 2006.  
 4 (Tr. 210-228, 260-312). Plaintiff received physical and mental health  
 5 treatment from CHAS providers, but no counseling. Also included in  
 6 the medical record are emergency room notes from Sacred Heart Medical  
 7 Center and Deaconess Medical Center. (Tr. 201-09, 252-53, 254-59.)

8 In making a residual functional capacity determination, the ALJ  
 9 must consider the opinions of acceptable medical sources about the  
 10 nature and severity of the Plaintiff's impairments and limitations.

11 20 C.F.R. §§ 404.1527, 416.927; S.S.R. 96-2p; S.S.R. 96-6p.  
 12 Acceptable medical sources include, among others, licensed physicians  
 13 and psychologists.<sup>3</sup> 20 C.F.R. §§ 404.1513(a), 416.913(a). A treating  
 14 or examining physician's opinion is given more weight than that of a  
 15 non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup>  
 16 Cir. 2004). If the treating or examining physician's opinions are  
 17 not contradicted, they can be rejected only with "clear and  
 18 convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir.  
 19 1996). If contradicted, the ALJ may reject the opinion if he states  
 20 specific, legitimate reasons that are supported by substantial  
 21 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d  
 22 1453, 1463 (9<sup>th</sup> Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747,  
 23 753 (9<sup>th</sup> Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9<sup>th</sup> Cir. 1989).

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24  
 25 <sup>3</sup>Other acceptable medical sources are licensed podiatrists and  
 26 optometrists and qualified speech-language pathologists, in their  
 27 respective areas of specialty only. 20 C.F.R. §§ 404.1513(a),  
 28 416.913.(a).

1 Historically, the courts have recognized conflicting medical evidence,  
 2 the absence of regular medical treatment during the alleged period of  
 3 disability, and the lack of medical support for doctors' reports based  
 4 substantially on a claimant's subjective complaints of pain, as  
 5 specific, legitimate reasons for disregarding the treating physician's  
 6 opinion. See *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604.

7 The opinions of Dr. Wert and Dr. Rosekrans, examining  
 8 psychologists, are contradicted by the opinion of Dr. Klein, at least  
 9 as to the existence and severity of Plaintiff's limitations.<sup>4</sup> Dr. Wert  
 10 and Dr. Rosekrans both assessed two marked limitations for at least  
 11 two functional categories and moderate limitations for a number of  
 12 functional abilities; Dr. Klein assessed only two moderate limitations  
 13 and no marked limitations. The ALJ explicitly adopted the opinion of  
 14 Dr. Klein and assigned "lesser weight" to the opinions of Dr. Wert,  
 15 Dr. Rosekrans, and Plaintiff's treating health care providers. (Tr.  
 16 27.) As such, the ALJ was required to set forth specific, legitimate  
 17 reasons supported by substantial evidence for rejecting the opinions  
 18 of Dr. Wert and Dr. Rosekrans.

19 The ALJ listed several reasons for adopting Dr. Klein's opinion  
 20 regarding Plaintiff's limitations. First, the ALJ asserted Dr.  
 21 Klein's testimony is "supported by the bulk of the evidence in the  
 22 record." (Tr. 27.) However, the ALJ did not cite any particular  
 23 evidence in the record consistent with Dr. Klein's opinion. The  
 24 medical record primarily consists of the opinions of Drs. Wert and  
 25 Rosekrans, CHAS records, and emergency room records. The ALJ did not

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26  
 27 <sup>4</sup>Dr. Klein testified he was "essentially in agreement" with the  
 28 diagnoses of Dr. Wert and Dr. Rosekrans. (Tr. 327.)

1 explain how these records are more consistent with Dr. Klein's opinion  
2 that the opinions of Dr. Wert and Dr. Rosekrans which assessed greater  
3 limitations. This is not a sufficiently specific reason for adopting  
4 the opinion of the non-examining psychologist.

5 The second reason given by the ALJ for adopting Dr. Klein's  
6 opinion is his testimony is "persuasive and reasonable based on the  
7 nature of claimant's mental impairments." (Tr. 27.) The meaning of  
8 this statement is not clear and the ALJ did not explain it or support  
9 it with citations to the record. Although the ALJ found Dr. Klein's  
10 testimony persuasive, that fact alone is not a specific, legitimate  
11 reason for adopting his opinion.

12 The ALJ also mentioned that he adopted Dr. Klein's testimony  
13 because it is "more consistent with the claimant's subjective  
14 complaints at the time of her initial application for benefits." (Tr.  
15 26.) Again, the ALJ's statement is not entirely clear. The ALJ made  
16 a properly supported negative credibility finding<sup>5</sup> (Tr. 25, 27) and  
17 seems to suggest Plaintiff's alleged symptoms increased over the  
18 course of the disability process. However, he also acknowledged  
19 Plaintiff alleged depression and difficulty learning new tasks in her  
20 application for benefits. (Tr. 25, 113.) The ALJ noted Plaintiff  
21 stated her depression makes her not want to be around others (Tr. 25,  
22 110), and she indicated difficulties with understanding, following  
23 instructions, memory, completing tasks, getting along with others and  
24 concentration. (Tr. 25, 113.) Plaintiff also stated she feared large

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25  
26 Plaintiff does not challenge the ALJ's negative credibility  
27 finding. The court concludes it is properly supported by substantial  
28 evidence.

1 groups and strangers (Tr. 25, 114) and had increased depression. (Tr.  
 2 25, 116, 123.) These allegations could be consistent with a range of  
 3 limitations, including those identified by Drs. Wert, Rosekrans and  
 4 Klein, and it is not immediately clear how these alleged symptoms are  
 5 more in keeping with Dr. Klein's opinion than the opinions of Dr. Wert  
 6 and Dr. Rosekrans. This reason is therefore not a specific,  
 7 legitimate reason supported by substantial evidence for rejecting the  
 8 reports of the examining psychologists.

9 With respect to Dr. Wert's opinion, the ALJ asserted, "Dr. Klein  
 10 indicated that he believed Dr. Wert's response to the State request  
 11 for information was completed in an exaggerate [sic] way especially if  
 12 based on the claimant's exaggerated personality testing scales." (Tr.  
 13 25-26.) The ALJ also noted that Dr. Wert's opinion was "likely  
 14 exaggerated" because of the child protection issues at stake and the  
 15 test results in support of Dr. Wert's opinion "were not entirely  
 16 valid." (Tr. 27.) These comments overstate Dr. Klein's testimony  
 17 regarding Dr. Wert's opinion. Dr. Klein first testified that he  
 18 essentially agreed with Dr. Wert regarding Plaintiff's diagnosis.  
 19 (Tr. 327.) Then Dr. Klein said,

20 Dr. Wirt [sic] added to our list of testing here an  
 21 MMPI and a Milan [sic] Clinical Multiaxial Inventory, Third  
 22 Edition. The Milan [sic] appeared to be filled out in an  
 23 exaggerated way, not totally valid, someone who is, has sort  
 24 of an odd type of, of response for someone who's attempting  
 to regain custody and you would think that, that person, if  
 they were going to fill out, get tested in, in an invalid  
 way would minimize to an unrealistic degree, the amount of  
 symptom complaints. And that would be sort of a natural  
 tendency. But here we have the opposite.  
 25

26 (Tr. 327, emphasis added.) Dr. Klein's comment about the Millon  
 27 results reflects on Plaintiff's odd responses, not on the validity of  
 28

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1 Dr. Wert's testing or an exaggerated analysis. It is not a reasonable  
2 inference from Dr. Klein's comment noting possible exaggerated test  
3 responses that Dr. Wert's opinion was exaggerated or that the overall  
4 test results were not valid. Dr. Wert also acknowledged the possible  
5 exaggeration and presumably took it into account in his opinion. (Tr.  
6 188.) The suggestion that Dr. Wert was motivated to exaggerate his  
7 opinion to the point of invalidity is without basis in the record.

8 Furthermore, the DSHS psychological/psychiatric assessment form  
9 completed by Dr. Wert a few days after his written opinion appears to  
10 have been overlooked. On cross-examination, Dr. Klein was asked about  
11 Dr. Wert's opinion that Plaintiff's psychological impairment was  
12 severe. (Tr. 332.) Dr. Klein responded:

13 Well, he, he was answering the question, was she  
14 capable of having her child returned to her custody. He did  
15 not speak to the issue with her for ability or adaptation to  
the work place and you, know, I think we have to understand  
the context of Dr. Wirt's [sic] report, what it was he was  
16 asked to assess.

17 (Tr. 332.) However, Dr. Wert did provide his opinion with regard to  
18 Plaintiff's limitations in the workplace. (Tr. 197-200.) Dr. Wert  
19 was asked to rate Plaintiff's cognitive and social limitations  
20 regarding Plaintiff's ability to perform on a normal day-to-day work  
basis. (Tr. 199.) He responded by assessing three marked limitations  
22 and four moderate limitations. (Tr. 199.) The ALJ did not mention  
23 Dr. Wert's work-related assessment in his summary of Dr. Wert's  
24 records (Tr. 21) or in rejecting Dr. Wert's opinion (Tr. 25); in fact,  
25 the DSHS form completed by Dr. Wert is not mentioned in the ALJ's  
decision. While the ALJ is not required to discuss every piece of  
27 evidence in the record, he is required to discuss reasons for  
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1 rejecting significant probative evidence. *Vincent v. Heckler*, 739  
2 F.2d 1393, 1394-95 (9<sup>th</sup> Cir. 1984). In this case, the ALJ erred by  
3 failing to discuss Dr. Wert's opinion about Plaintiff's work-related  
4 limitations.

5 The ALJ also agreed with Dr. Klein's assessment that Plaintiff  
6 was capable of working in the past with her mental condition and there  
7 is no evidence she could not continue to do so. (Tr. 27.) However,  
8 there is little evidence in the record to support this assumption.  
9 Plaintiff's last reported work efforts were in 1988 or 1989, at least  
10 three years before her application for benefits. (Tr. 338.) There is  
11 no evidence in the record about Plaintiff's performance in previous  
12 jobs. Furthermore, there is no evidence about Plaintiff's mental or  
13 physical status during the periods she was employed. The assumptions  
14 that Plaintiff functioned adequately at work and under the same level  
15 of impairment several years before the record begins is not supported  
16 by substantial evidence in the record.

17 The ALJ relied almost exclusively on Dr. Klein's opinion to  
18 justify giving "lesser weight" to the opinions of Drs. Wert and  
19 Rosekrans. However, the opinion of a non-examining physician cannot  
20 by itself constitute substantial evidence that justifies the rejection  
21 of the opinion of either an examining physician or a treating  
22 physician. *Lester*, 81 F.3d at 831, citing *Pitzer v. Sullivan*, 908  
23 F.2d 502, 506 n.4 (9<sup>th</sup> Cir. 1990). The opinion of a non-examining  
24 physician may be accepted as substantial evidence if it is supported  
25 by other evidence in the record and is consistent with it. *Andrews v.*  
26 *Shalala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir. 1995); *Lester v. Chater*, 81 F.3d  
27 821, 830-31 (9<sup>th</sup> Cir. 1995). Cases have upheld the rejection of an  
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1 examining or treating physician based on part on the testimony of a  
 2 non-examining medical advisor; but those opinions have also included  
 3 reasons to reject the opinions of examining and treating physicians  
 4 that were independent of the non-examining doctor's opinion. *Lester*,  
 5 81 F.3d at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9<sup>th</sup>  
 6 Cir. 1989) (reliance on laboratory test results, contrary reports from  
 7 examining physicians and testimony from claimant that conflicted with  
 8 treating physician's opinion); *Roberts v. Shalala*, 66 F.3d 179 (9<sup>th</sup>  
 9 Cir. 1995) (rejection of examining psychologist's functional  
 10 assessment which conflicted with his own written report and test  
 11 results). Thus, case law requires not only an opinion from the  
 12 consulting physician but also substantial evidence (more than a mere  
 13 scintilla but less than a preponderance), independent of that opinion  
 14 which supports the rejection of contrary conclusions by examining or  
 15 treating physicians. *Andrews*, 53 F.3d at 1039.

16 Here, the ALJ failed to identify any evidence apart from Dr.  
 17 Klein's opinion which justifies rejecting the opinions of two  
 18 examining physicians. The reasons provided by the ALJ for adopting  
 19 Dr. Klein's opinion are not specific, legitimate reasons supported by  
 20 the record. The ALJ gave an inadequately supported reason for giving  
 21 little weight to Dr. Wert's opinion, did not discuss Dr. Wert's DSHS  
 22 report containing significant probative evidence, and gave no specific  
 23 reasons for rejecting Dr. Rosekrans' opinions. Therefore, the ALJ did  
 24 not properly justify adopting the opinion of a non-examining  
 25 psychologist over the opinions of two examining psychologists. Thus,  
 26 the ALJ erred.

27 There are two remedies where the ALJ fails to provide adequate  
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1 reasons for rejecting the opinions of a treating or examining  
2 physician. The general rule, found in the *Lester* line of cases, is  
3 that "we credit that opinion as a matter of law." *Lester v. Chater*,  
4 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1996); *Pitzer v. Sullivan*, 908 F.2d 502, 506  
5 (9<sup>th</sup> Cir. 1990); *Hammock v. Bowen*, 879 F.2d 498, 502 (9<sup>th</sup> Cir. 1989).  
6 Another approach is found in *McAllister v. Sullivan*, 888 F.2d 599 (9<sup>th</sup>  
7 Cir. 1989), which holds a court may remand to allow the ALJ to provide  
8 the requisite specific and legitimate reasons for disregarding the  
9 opinion. See also *Benecke v. Barnhart*, 379 F.3d 587, 594 (9<sup>th</sup> Cir.  
10 2004) (court has flexibility in crediting testimony if substantial  
11 questions remain as to claimant's credibility and other issues).  
12 Where evidence has been identified that may be a basis for a finding,  
13 but the findings are not articulated, remand is the proper  
14 disposition. *Salvador v. Sullivan*, 917 F.2d 13, 15 (9<sup>th</sup> Cir. 1990)  
15 (citing *McAllister*); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9<sup>th</sup>  
16 Cir. 1990). In this case, there may be specific, legitimate reasons  
17 for disregarding the opinions of the examining physicians which have  
18 not been properly articulated. Thus, remand is the proper remedy.

19 **CONCLUSION**

20 Having reviewed the record and the ALJ's findings, the court  
21 concludes the ALJ's decision is not supported by substantial evidence  
22 and is based on legal error. On remand, the ALJ shall properly  
23 consider the medical opinion evidence and make a new RFC determination  
24 based on articulated and properly justified reasoning. Accordingly,

25 **IT IS ORDERED:**

26 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is  
27 **GRANTED**. The matter is remanded to the Commissioner for additional

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1 proceedings pursuant to sentence four 42 U.S.C. 405(g).

2 . Defendant's Motion for Summary Judgment (**Ct. Rec. 24**) is  
3 **DENIED**.

4 . An application for attorney fees may be filed by separate  
5 motion.

6 The District Court Executive is directed to file this Order and  
7 provide a copy to counsel for Plaintiff and Defendant. Judgment shall  
8 be entered for Plaintiff and the file shall be **CLOSED**.

9 DATED March 2, 2009.

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S/ CYNTHIA IMBROGNO  
12 UNITED STATES MAGISTRATE JUDGE  
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